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# AVOID BALD MEN AND PEOPLE WITH GREEN SOCKS? OTHER WAYS TO IMPROVE THE VOIR DIRE PROCESS IN JURY SELECTION\*

VALERIE P. HANS\*\* AND ALAYNA JEHL\*\*\*

## INTRODUCTION: THE PROBLEM OF JUROR BIAS

The detection of juror bias is a serious challenge in contemporary jury trials. Prospective jurors have a host of attitudes, relevant experiences, and potential biases that merit full exploration during the voir dire questioning period in jury selection. Some attorneys, deeply concerned about possible juror bias but unable to examine it adequately during voir dire, have relied on demographic characteristics and stereotypes only slightly less preposterous than the avoidance of bald men and people with green socks. This Article reviews what we know about the voir dire process, concludes that typical voir dire is often ineffective in detecting juror bias, and recommends specific changes in voir dire practice.

### *A. Juror Bias in Criminal Trials*

Traditionally, there has been great concern about the problem of juror bias and the need for searching voir dire in criminal cases. In criminal trials, jurors make decisions that may profoundly affect defendants. The legal system must ensure that these critical decision makers are able to make fair and impartial decisions. Peremptory challenges and challenges for cause are the legal tools used to remove biased jurors or jurors who give the appearance of bias. However,

\* This Article was invited for a special issue of the Chicago-Kent Law Review devoted to the jury, edited by Professor Nancy Marder. Portions of this article are based on Valerie P. Hans, *Improving the Voir Dire Process in Civil Trials* (2001), a report funded by the Roscoe Pound Foundation, the Delaware Trial Lawyers Association, and the Delaware Chapter of the American Board of Trial Advocates.

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empirical data have shown that many jurors who actually sit for trials are influenced by prejudices and biases.<sup>1</sup>

The necessity of examining potential jurors' attitudes gains importance from recent experimental work on how jurors reach their decisions. These studies show that jurors' life experiences and attitudes are prime factors in shaping perceptions of evidence.<sup>2</sup> Life experiences and preconceptions contribute to the narrative or story that jurors develop as they listen to evidence and decide the case. Evidence that is inconsistent with jurors' preconceptions and the developing story may be discounted or ignored.

Studies have shown that about 10% of verdict preference disparities can be predicted using statistical models based on the individual juror's attitudes, background characteristics, and personality traits.<sup>3</sup> Attitudes tend to be more powerful predictors of verdict choices than demographic characteristics.<sup>4</sup> Even though at times demographic variables such as a juror's gender, age, race, income, and occupation may be associated with favorable or unfavorable attitudes, their links to verdicts are usually modest.<sup>5</sup> Furthermore, it is now unconstitutional to use a potential juror's race or gender as the basis for a peremptory challenge.<sup>6</sup>

1. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001).

2. NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 87-112 (2000); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 47-96 (1986); REID HASTIE ET AL., *INSIDE THE JURY* (1983) (providing a description of the "story model" of juror decision making); Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 42 (Reid Hastie ed., 1993).

3. Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 712 (1991).

4. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1 (1997).

5. *Id.* at 10-12. For an excellent summary of research studies examining the impact of demographic and attitudinal variables, see Baldus et al., *supra* note 1, at 15-22 & nn.29-47. They report that "a number of studies based on both mock and actual trials indicate that demographics explain relatively little in the way of juror-rating behavior in guilt trials." *Id.* at 18; see also NEIL J. KRESSEL & DORIT F. KRESSEL, *STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING* 93-135 (2002); Shari S. Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 79 JUDICATURE 178 (1990).

6. *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 129-31, 146 (1994) (holding that discrimination in peremptory challenges on the basis of gender is unconstitutional); *Georgia v. McCollum*, 505 U.S. 42, 44-46, 59 (1992) (holding that racially discriminatory use of peremptory challenges is not permitted by a defendant in a criminal case); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 614-17, 630-32 (1991) (concluding that racially discriminatory use of peremptory challenges is not permitted by private litigants in civil litigation); *Batson v. Kentucky*, 476 U.S. 79, 82-83, 100 (1986) (holding that racially discriminatory use of peremptory challenges is not permitted by the prosecutor in a criminal case).

Capital jury selection poses particular challenges. Pretrial publicity, vivid and gruesome evidence, and the awesome duty of the capital jury all interact to create a greater potential for juror bias. A prospective juror's support for the death penalty, a major factor that is used to determine whether the juror is suitably impartial or "death-qualified," is related to a host of other criminal justice views and attitudes.<sup>7</sup> Death penalty support and related attitudes are also linked to race and gender.<sup>8</sup> Therefore, challenges based on death penalty attitudes may have a deleterious impact on the representativeness and impartiality of the capital jury.

Thus, the potential for bias in criminal jury trials, and empirical research about the role of attitudes and perceptions in shaping juror decisions, make it imperative to question prospective jurors during voir dire.

### B. Juror Bias in Civil Trials

Juror bias also appears to be a problem in the civil jury system. In recent years, national polls have produced some disquieting results about Americans' views and attitudes about civil justice. For instance, significant minorities of polled respondents said that they could not be fair and impartial if they were asked to sit as jurors in cases involving tobacco companies, asbestos manufacturers, or health maintenance organizations.<sup>9</sup> A national poll conducted in the fall of 2002, following a series of high-profile corporate scandals, found that many members of the public expressed negative views of corporate management.<sup>10</sup>

7. Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 175-76 (2002); Robert Fitzgerald & Phoebe Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984).

8. For the impact of race, see Baldus et al., *supra* note 1, at 16-17; William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001). For evidence that women are less supportive of the death penalty than men, see Fitzgerald & Ellsworth, *supra* note 7.

9. Bob Van Voris, *Voir Dire Tip: Pick Former Juror*, NAT'L L.J., Nov. 1, 1999, at A1. Fifteen percent said they could not be fair if a case involved a tobacco company, 14% if a party was an asbestos manufacturer, and 12% if a party was a health maintenance organization. A year later, the numbers saying they could not be impartial increased: 34% for tobacco companies and 31% for asbestos manufacturers. Bob Van Voris, *Jurors to Lawyers: Dare to be Dull*, NAT'L L.J., Oct. 23, 2000, at A1.

10. Tamara Loomis, *Scandals Rock Juror Attitudes: Enron/WorldCom Ripple Seen Across the Board*, NAT'L L.J., Oct. 21, 2002, at A30. This study was conducted by DecisionQuest and the Minority Corporate Counsel Association, and consisted of a national survey and focus groups in seven locations across the United States. The article reported that "[m]ore than 80%

At the same time, many members of the public believe that jury awards are "out of control."<sup>11</sup> Other research indicates that jurors and the public question the merits and credibility of civil plaintiffs, believing that there are substantial numbers of frivolous lawsuits.<sup>12</sup> For instance, people have preconceptions about whiplash and other connective-tissue injuries, believing they are minimal or fraudulent, which can affect legal decisions about the merits of plaintiffs' claims of these injuries.<sup>13</sup> These attitudinal patterns indicate that both defendants and plaintiffs in civil trials face the potential of juror bias.

The conclusion from the existing research is that jurors' experiences with and pre-existing attitudes toward civil litigation, plaintiffs, and corporate defendants shape perceptions of evidence and may influence civil jury verdicts and awards.<sup>14</sup> These experiences and attitudes should be explored during voir dire to determine whether serious bias in prospective jurors exists.

### I. VOIR DIRE AND JUROR BIAS

The research we review below indicates that limited voir dire, as it is practiced in many United States jurisdictions, is not effective in identifying and vetting jurors with relevant experiences and attitudes. Jurors may misrepresent or withhold relevant information. However, the more frequent problem is that the structure of the voir dire does not facilitate the full disclosure of relevant information. This Article describes how voir dire is practiced in different jurisdictions, and how features of voir dire contribute to judges' and attorneys' difficulty in

of those polled agreed that 'the events of Enron and WorldCom are just the tip of the iceberg.'" *Id.*

11. Valerie P. Hans & William S. Lofquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 BEHAV. SCI. & L. 181, 182 (1994); Van Voris, *supra* note 9.

12. For a summary of attitudes toward both plaintiffs and defendants in civil litigation, see VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 22-49, 58-78, 138-77 (2000) (discussing attitudes towards plaintiffs, civil litigation, and business defendants respectively).

13. Valerie P. Hans & Nicole Vadino, *Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury*, 67 TENN. L. REV. 569, 569-72 (2000); I. Barry Guerke, *Harnessing Juror Attitudes about Soft Tissue Cases*, ADVOCATE, Winter 2001, at 22; Valerie P. Hans, *What Jurors Think about Connective Tissue Injuries*, TRIAL, July 2000, at 18.

14. For example, research on civil jurors found that attitudes toward civil litigation were significantly related to judgments in actual and mock jury verdicts. Attitudes toward business were less important and less reliably related to jury decisions in cases with one or more business parties. See HANS, *supra* note 12, at 74-76, 170-75 (discussing attitudes toward civil litigation and attitudes towards business respectively).

identifying juror bias. It analyzes the factors that impede effectiveness and recommends specific improvements in voir dire practice.

### A. *Variations in Voir Dire*

The practice of voir dire and jury selection varies among the state and federal jurisdictions. There are a number of ways in which voir dire can be carried out. Table 1 shows the possible range of variations in voir dire practice.

**Table 1:**

Range of Variations in Voir Dire Procedures

<b>Traditional Limited Voir Dire</b>	<b>Expansive Voir Dire</b>
No pretrial juror questionnaire	Pretrial juror questionnaire
Limited number of questions	Larger number of questions
Questions very specific to trial	Broader range of questions
Close-ended questions that permit only yes or no responses	Combination of close-ended and open-ended questions
Group questioning of prospective jurors	Individual, sequestered voir dire
Judge alone conducts voir dire	Judge and attorneys both participate in voir dire

At one end of the continuum is the most limited form of voir dire. Limited voir dire is characterized by judge-only questioning, a limited range and number of questions, questions asked exclusively in yes/no format, group rather than individual questioning of prospective jurors, and reliance upon jurors' self-identification as potentially biased. Professor Nancy Marder argues that a preference for limited voir dire may reflect the "reasonable person" view of jurors; that is, the notion that jurors are predominantly reasonable and impartial, and any one group of such reasonable persons will evaluate the evidence and reach a verdict in the same fashion as any other collection of reasonable persons.<sup>15</sup> At the other end of the continuum is the most expansive form of voir dire. In this form, the judge and the

15. Nancy S. Marder, September 11th: A Catalyst for Changing the Voir Dire Process?, Presentation at the Association of American Trial Lawyers Annual Convention (July 20, 2002).

attorneys both participate directly in the questioning of prospective jurors, the questioning is wide-ranging, questions include both close-ended and open-ended items, jurors are individually questioned, and the judge and attorneys are able to make independent assessments of the potential bias of the prospective jurors rather than relying exclusively on the juror's own self-assessment of bias.

There is minimal empirical work on how actual voir dire practice varies from state to state. The National Center for State Courts, in conjunction with the Bureau of Justice Statistics, has published comprehensive information about one dimension of voir dire: who conducts the questioning.<sup>16</sup> Their compendium reports who conducts voir dire in state and federal trial courts of general jurisdiction.

By far the most frequent practice is some combination of attorney and judge questioning, used in forty-three jurisdictions (forty state courts of general jurisdiction, the courts in the District of Columbia and Puerto Rico, and the federal district courts).<sup>17</sup> The actual extent of attorney involvement in voir dire in these jurisdictions is unclear; it could range considerably. In six states, judges conduct the voir dire alone, although in several of these states the judge may permit attorney questions. In four states, attorneys alone conduct the voir dire, and a fifth state, New York, has attorneys conduct civil voir dire.<sup>18</sup>

The Federal Judicial Center surveyed 124 federal judges in the 1990s to determine their actual voir dire practices.<sup>19</sup> Fully 59% of the judges said that they ordinarily allowed counsel to ask questions during voir dire in civil cases, and 54% permitted some attorney questioning in criminal cases, up from about 30% in 1977.<sup>20</sup> About a third of all judges (33%) said they conducted the initial examination and then permitted attorneys to ask a limited number of additional

16. DAVID B. ROTTMAN ET AL., STATE COURT ORGANIZATION 1998, at 273–77 tbl. 41 (2000) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf> [hereinafter STATE COURT ORGANIZATION].

17. Table 41 lists forty-two jurisdictions and we have added an additional state, Arizona, to the judge and attorneys category. Arizona is identified in Table 41 as a judge-only voir dire state, but has since changed its rules and would now be classified as a judge and attorneys voir dire state. See ARIZ. R. CIV. P. 47(b)(2).

18. STATE COURT ORGANIZATION, *supra* note 16.

19. John Shapard & Molly Johnson, Memorandum From the Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules (Oct. 4, 1994) (on file with the Chicago-Kent Law Review) (reporting that researchers mailed a questionnaire to a randomly selected sample of 150 active federal district court judges, and 83% (124 judges) responded to the survey).

20. *Id.* at 1.

questions.<sup>21</sup> Another 18% said they conducted the initial exam and then gave counsel an extended opportunity to ask questions.<sup>22</sup> Finally, 9% of the judges allowed counsel to conduct most or all of the voir dire.<sup>23</sup> In an interesting finding, the extent of attorney involvement in voir dire bore no relationship to the reported amount of time typically spent on voir dire.<sup>24</sup>

The Jury Summit 2001 conference brought together judges, court administrators, jury commissioners, lawyers, and other interested parties from twenty-eight U.S. jurisdictions to exchange innovative practices and ideas about the conduct of jury trials.<sup>25</sup> The participants completed a questionnaire that asked for the length of the typical noncapital felony voir dire in their jurisdictions. The average felony voir dire time was 5.13 hours, ranging from less than one hour to five days.<sup>26</sup> The modal or most common response was two hours.<sup>27</sup>

A study of 382 criminal jury trials in four state courts (Los Angeles, California; Maricopa County, Arizona; the District of Columbia; and the Bronx, New York) also showed variation in voir dire across jurisdictions.<sup>28</sup> The length of the average voir dire reportedly ranged between two and three hours, except in the Bronx, which had a median length of seven hours.<sup>29</sup> Judges conducted voir dire in Los Angeles, but in the other three sites both judges and attorneys participated in voir dire questioning of prospective jurors. In Los Angeles and the Bronx, case-specific juror questionnaires were used in about a third of all jury trials, compared to 19% of D.C. trials and no trials in Maricopa County.<sup>30</sup> All of the empirical evidence about the length and extensiveness of voir dire suggests that it differs substantially across jurisdictions.

21. *Id.* at 2.

22. *Id.*

23. *Id.*

24. *Id.* at 2–3.

25. The New York State Unified Court System and the National Center hosted the Conference for State Courts. The Conference of Chief Justices, American Judges Association, Conference of State Court Administrators, and the National Association sponsored it for Court Management. Jury Summit 2001 took place on Jan. 31–Feb. 2, 2001 in New York, NY.

26. Attendee/Faculty results are available on the conference web page, <http://www.jurysummit.com>. Estimated voir dire times are provided at 4, question 9. To calculate an average, a day of court time was counted as six hours.

27. *Id.*

28. PAULA L. HANNAFORD AGOR ET AL., ARE HUNG JURIES A PROBLEM? (2002) (report to the National Institute of Justice; jury selection is discussed at 37–38 of the report) [hereinafter ARE HUNG JURIES A PROBLEM?].

29. *Id.* at 38.

30. *Id.*



Some jurisdictions have quite limited voir dire, and judges are reluctant to expand the range and types of questions asked of prospective jurors, particularly in lower-stakes cases, perhaps because they adhere to the reasonable person view of the jury, as Marder suggests.<sup>31</sup> Attorneys who have pressed for expansion of voir dire face an uphill battle. What difference might it make to have a limited versus expanded voir dire? We turn to the research evidence on that question.

### *B. Consequences of Limited Voir Dire: Research Evidence*

Many commentators have observed that limited voir dire presents serious problems for identifying biased jurors.<sup>32</sup> A project undertaken by District of Columbia Superior Court Judge Gregory E. Mize provides a compelling demonstration of the weaknesses of limited voir dire.<sup>33</sup> Judge Mize's voir dire procedure was typical of judges in the D.C. Superior Court. After initially asking a set of questions to a group of about sixty prospective jurors in the open courtroom, he and the attorneys would follow up individually with those who had responded affirmatively to the initial questions.<sup>34</sup> Thus, his typical voir dire procedure was quite comparable to the limited, or least expansive, voir dire approach described earlier.

However, in a new experimental procedure, Judge Mize decided to interview every potential juror regardless of whether they responded affirmatively to the initial questions.<sup>35</sup> Under the experimental procedure, he prompted each juror who had not indicated a "yes" response to any of the initial questions: "I notice you did not respond to any of my questions. I just wondered why. Could you explain?" or "Is it because the questions did not apply to you?"<sup>36</sup> Mize reports that although many jurors indicated that the questions did not apply to

31. On limited voir dire, see Debora A. Cancado, *The Inadequacy of the Massachusetts Voir Dire*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 81, 83-84 (2000). On the reasonable person view of the voir dire, see Marder, *supra* note 15.

32. JURYWORK: SYSTEMATIC TECHNIQUES, Release 21 (Elissa Krauss & Beth Bonora eds., 2d ed. 2000); Neal Bush, *The Case for Expansive Voir Dire*, 2 LAW & PSYCHOL. REV. 9, 9 (1976); Valerie P. Hans, *The Conduct of Voir Dire: A Psychological Analysis*, 11 JUST. SYS. J. 40, 41-42 (1986); Douglas B. Catts, *Jury Bias*, ADVOCATE, Winter 2001, at 20; Frederick W. Iobst, *The Goal of Expanded Voir Dire*, ADVOCATE, Winter 2001, at 24.

33. Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10.

34. *Id.* at 11-12.

35. *Id.* at 12.

36. *Id.*

them, a significant minority said that they did have something to say in response to the questions.<sup>37</sup> Some of these prospective jurors provided disturbing information that led to their removal for cause. For example:

"I do not understand your questions or remember the past very well."

"I was frightened to raise my hand. I have taken high blood pressure medications for twenty years. I am afraid I'll do what others tell me to do in the jury room."

"I was on a hung jury before—I don't know if I can follow instructions of the court for gun possession—that was the problem in my other trial." [In a trial for gun offenses]

"My grandson was killed with a gun so the topic of guns makes my blood pressure go up." [In a trial for gun offenses]

"I'm the defendant's fiancée."<sup>38</sup>

What Judge Mize uncovered in his courtroom led him to conclude that individual voir dire of all prospective jurors is "an indispensable way of ferreting out otherwise unknown juror qualities."<sup>39</sup>

A number of systematic studies reinforce Judge Mize's conclusion that a limited form of voir dire is not very effective in detecting which prospective jurors are biased.<sup>40</sup> Most of the research on voir dire has been done with criminal cases, but the research findings should apply to civil cases as well.

Dale Broeder, a member of the Chicago Jury Project begun in the 1950s, undertook one of the earliest systematic studies of voir dire.<sup>41</sup> Broeder interviewed 225 jurors after their trials had concluded. Broeder reported that a number of jurors had failed to reveal potentially prejudicial views or relevant information during voir dire. He concluded, "voir dire was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'"<sup>42</sup>

37. *Id.*

38. These and other examples may be found in Judge Mize's article. *Id.* at 12–13.

39. *Id.* at 12.

40. Judge Mize expanded his experiment with juror questioning to civil trials, and reports the results in Gregory E. Mize, *Be Cautious of the Quiet Ones*, VOIR DIRE, Summer 2003, at 1; see also Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 LAW & HUM. BEHAV. 131 (1987); Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUM. BEHAV. 1 (1982); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245 (1981).

41. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

42. *Id.* at 505.

Zeisel and Diamond studied the use of peremptory challenges in federal district court.<sup>43</sup> In twelve trials, prospective jurors who had been challenged by the prosecution or the defense remained in court, listened to the evidence, and were asked by the researchers to render a verdict.<sup>44</sup> On the basis of post-trial interviews and information about what judgments the challenged jurors would have made if they had been selected, Zeisel and Diamond reached a conclusion similar to Broeder: "On the whole, the voir dire, as conducted in these trials did not provide sufficient information for attorneys to identify prejudiced jurors."<sup>45</sup>

In another study of the efficacy of voir dire, Seltzer, Venuti, and Lopes observed jury selection in thirty-one criminal trials in Superior Court in the District of Columbia, recording the questions asked of prospective jurors and their answers.<sup>46</sup> They conducted post-trial interviews with 190 jurors who had been seated, and compared their voir dire responses with the information gleaned from the post-trial interviews.<sup>47</sup> Seltzer and his colleagues observed a number of discrepancies. For instance, 25% of jurors who admitted that they or members of their family had been victims of crime nevertheless did not disclose that fact on voir dire.<sup>48</sup> When data from jurors who were victims themselves were examined separately, the researchers concluded that over half of those who had been crime victims and should have come forward did not do so.<sup>49</sup>

The researchers found similar underreporting during voir dire about relationships with police officers.<sup>50</sup> A typical question during voir dire was whether potential jurors had close friends or family who worked in law enforcement occupations. A total of 38% of the jurors who were interviewed said that they or their close friends or relatives were in law enforcement.<sup>51</sup> But only about a quarter of them came forward during the voir dire; the rest should have come forward but

43. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 491-92 (1978).

44. *Id.* at 498-99.

45. *Id.* at 528.

46. Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451 (1991).

47. *Id.* at 453.

48. *Id.* at 455.

49. *Id.* at 456. Fully 52% of the jurors who should have come forward because of their crime victimization did not.

50. *Id.*

51. *Id.*

did not.<sup>52</sup> Nearly half (47%) of the interviewed jurors stated that if the defendant testifies at trial, the defendant must prove his or her innocence in at least some cases.<sup>53</sup> None of these jurors came forward in response to this issue during voir dire, however.<sup>54</sup>

Research by Cathy Johnson and Craig Haney uncovered divergence between voir dire responses and views expressed during post-trial interviews.<sup>55</sup> They observed four felony voir dres in California. The average time of the voir dire was four hours and fifty-five minutes.<sup>56</sup> The judge, prosecutor, and defense attorney all participated in the questioning of prospective jurors, so the voir dire was more extensive than in some of the other projects we have reviewed. The researchers found that prosecutors and defense attorneys were somewhat effective in eliminating potential jurors who would have been hostile to their sides.<sup>57</sup> However, some jurors served who disagreed with the presumption of innocence.<sup>58</sup> Other jurors admitted they had not been able to set aside their personal feelings or biases during the trial.<sup>59</sup>

Nietzel and Dillehay compared the effects of different types of voir dire in capital cases.<sup>60</sup> They concluded that limited voir dire in capital cases decreases the likelihood of successful defense challenges for cause.<sup>61</sup> In their first study, they compared four types of voir dire methods in thirteen Kentucky capital trials.<sup>62</sup> The voir dire procedures varied. Some voir dres were conducted in a sequestered fashion, while in others the questioning of prospective jurors took place en masse in open court, in the presence of other potential jurors.<sup>63</sup> The type of voir dire affected the rate of successful challenges for cause. Judges eliminated a greater percentage of prospective jurors for cause for defense reasons when they were questioned

52. *Id.* at 456.

53. *Id.* at 458.

54. *Id.* at 457–58.

55. Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of Its Content and Effect*, 18 LAW & HUM. BEHAV. 487 (1994).

56. *Id.* at 494.

57. *Id.* at 498.

58. *Id.* at 498–99.

59. *Id.* at 499.

60. Nietzel & Dillehay, *supra* note 40.

61. *Id.* at 10.

62. *Id.* at 5–6.

63. *Id.* at 6.

individually.<sup>64</sup> In a second study, Nietzel, Dillehay, and Himelein replicated the basic finding with a sample of capital voir dres from South Carolina, California, and Kentucky.<sup>65</sup> The researchers undertook a number of analyses to determine why the defense challenges for cause were higher under more extensive voir dire, and concluded that the greater information about prospective jurors was responsible.<sup>66</sup>

## II. STEREOTYPES AND LIMITED VOIR DIRE

One consequence of limited voir dire is that it encourages attorneys to rely on stereotypes based on a juror's demographic characteristics because that is often the primary information that they have about each individual juror. If prospective jurors are questioned in groups instead of individually, then lawyers may know little about most prospective jurors except for obvious physical and demographic characteristics. Attorneys may have little alternative to exercising their peremptory challenges on stereotypes based on these factors.

Defense attorney Abbe Smith reports two experiences in which she relied on racial stereotypes to dismiss jurors.<sup>67</sup> One case involved a Black man facing a predominantly White jury panel, while the other was a White man facing a predominantly Black jury panel. Both jury selection proceedings were quick because the judges denied all requests for attorney-conducted and individual voir dire, and rejected most of the attorney's proposed open-ended and probing questions.<sup>68</sup> Knowing very little about the jurors, she confesses that she relied on the facts she had available, which were primarily their demographic characteristics.<sup>69</sup> She employed all her peremptory challenges to excuse White jurors in the first case and almost all of the challenges

64. *Id.* at 8.

65. Michael T. Nietzel et al., *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCI. & L. 467 (1987). One puzzle is why defense challenges were affected by voir dire variations, but prosecution challenges were not. Their data collection predated the use of the *Witt* standard first enunciated in *Wainwright v. Witt*, 469 U.S. 412 (1985) (stating the proper standard for exclusion for cause is when a prospective capital juror's views on the death penalty would prevent or substantially impair the performance of his or her duties as a juror). They predict that more heterogeneous dismissals (by both prosecution and defense) will result from the more ambiguous *Witt* standard. Nietzel et al., *supra* at 476.

66. Nietzel et al., *supra* note 65, at 476.

67. Abbe Smith, "Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 524-28 (1998).

68. *Id.* at 525, 526, 528.

69. *Id.* at 526, 528.

to excuse Black jurors in the second case. Smith realized that racial or demographic stereotypes might be inaccurate. However, without meaningful exploration of the jurors' attitudes and life experiences, she was left to consider the generalizations on which the stereotypes are based. She argues, "it is unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny."<sup>70</sup> In her view, the ethical obligation to comply with *Batson* conflicts with the ethical obligation of defense attorneys to vigorously defend their clients: "The task of the lawyer, therefore, is to outsmart the system—to figure out the demographics of justice and to manipulate it during jury selection by eliminating jurors with the so-called wrong personal characteristics."<sup>71</sup>

Stanford Law School professor Barbara Babcock has analyzed the issue of stereotyping during voir dire.<sup>72</sup> Recalling earlier times in which she practiced as a defense attorney in the District of Columbia in the 1960s, Babcock reflects on the omnipresence of stereotyping during jury selection:

What chaos it seemed was present in those scenes: people making choices on the basis of intuition, stereotyping, and prejudice. The fifty-year-old black janitor I struck from the jury that would have tried my twenty-year-old African American client for armed robbery might indeed have resented him. But he might also have seen himself or his son or the whole suffering race and felt the deepest empathy for the accused. Similarly, the prosecutors who dismissed African American women might have mistakenly deprived the People's jury of stern protectors of law and order.<sup>73</sup>

Babcock argues that the pool of information about prospective jurors must be expanded to avoid relying on stereotypes.<sup>74</sup> Tailored questionnaires, for example, help the parties base their arguments for cause challenges and their peremptory challenge decisions on actual biases rather than the color of a person's skin.<sup>75</sup>

70. *Id.* at 531.

71. *Id.* at 530 n.27.

72. Barbara Allen Babcock, *Jury Service and Community Representation*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 460, 463 (Robert E. Litan ed., 1993) [hereinafter Babcock, *Jury Service*]; Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

73. Babcock, *Jury Service*, *supra* note 72, at 463.

74. *Id.* at 480.

75. *Id.*

### III. JUROR PRIVACY AND VOIR DIRE

One issue that arises in the context of voir dire is the privacy of individual prospective jurors. Jurors reportedly feel that the judge and the attorneys are not sensitive enough to jurors' privacy concerns.<sup>76</sup> When jurors are forced to divulge information that does not seem relevant to the case, such as their addresses or where their children attend school, jurors may experience dismay and distrust. They may see this as private information that is completely irrelevant to their potential for bias in the trial; some jurors even believe it is dangerous to allow access to it. Jurors may fear retaliation after their verdict.<sup>77</sup> Jurors who do not understand how personal information and other lines of questioning are relevant to potential biases may be less likely to disclose the information.<sup>78</sup>

An empirical study by University of Texas Professor Mary Rose reveals that many jurors feel that some voir dire questions seem unnecessary or unrelated to the case; 43% responded so in her study.<sup>79</sup> Jurors who sat for the whole trial were less likely than those excused from service to say that voir dire questions were irrelevant, yet 30% of them still did so.<sup>80</sup> About a quarter responded that they felt uncomfortable with some questions, while a similar proportion felt that the questions seemed "too private."<sup>81</sup> When asked how offended they were by voir dire questions, the average ratings were around the middle on the seven-point scale.<sup>82</sup>

Questions that the jurors interviewed by Rose found to be unnecessary, uncomfortable, or too private pertained to three broad categories.<sup>83</sup> The first was their involvement with crime or the courts, including their family's experiences with crime and the courts and past crime victimization or criminal charges. Some examples are, "Have you ever been to court before?" or "Have you ever hired an attorney?"<sup>84</sup> The second category dealt with the personal characteris-

76. Paula Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 20, 25 (2001).

77. For a gripping example of jurors' fears of retaliation, see Benjamin Weiser, *A Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. TIMES, Jan. 5, 2003, at A1.

78. Hannaford, *supra* note 76, at 20, 25.

79. Mary R. Rose, *Jurors' Views of Voir Dire Questions*, 85 JUDICATURE 10, 13, 17 (2001).

80. *Id.* at 13-14.

81. *Id.* at 13.

82. *Id.* at 17.

83. *Id.* at 14-16.

84. *Id.* at 14.

tics of the potential jurors and their families, including marital and parental status, general location of residency, and the juror's, spouse's, and children's type or place of employment. Some questions asked were, "Do you have any children?"; "What are their ages?"; and "Where do you work?"<sup>85</sup> The third category of objectionable questions related to interests and associations, including religious affiliations, voluntary organizations, hobbies, and gun ownership. Most of the jurors felt these questions were not relevant and instead encouraged stereotyping about their proclivities.<sup>86</sup>

One juror, for example, questioned how experiences with the courts and one's family's experiences have to do with a juror's ability to be fair.

I could see a criminal record, but even with a misdemeanor, if you've served your time, why you got to keep paying? The questions they asked had nothing to do with how a person could be as a juror. Your family isn't going to be on the jury, you are.

If it's my [criminal] record, OK, but [a family member] could die in the gas chamber, and it's not you. They dig too much into the family, and that's why some don't want to be on the jury. They avoid it.<sup>87</sup>

Jurors saw particular questions as objectionable. In one drug case, four jurors did not like being asked if they knew people with alcohol or drug problems. One man admitted to his own DUI, but said, "I didn't want to talk about it in front of a room filled with 100 or so people."<sup>88</sup> Two potential jurors did not approve of another prospective juror being forced to share the medical condition of his ill wife with the panel. In one extreme case, a female prospective juror admitted to having been raped, but never reported it to the police.<sup>89</sup> The prosecutor did not believe her when she said she could be fair, so he bluntly described alleged facts and brought the prospective juror to tears, getting her to say she could not be impartial. Several jurors cited this incident as being too private or uncomfortable.<sup>90</sup>

Despite their apprehensions with certain questions, the jurors still rated most questions as useful and comfortable; the attorneys' concern for the jurors' privacy was rated higher than the midpoint.<sup>91</sup>

85. *Id.* at 15–16.

86. *Id.*

87. *Id.* at 15.

88. *Id.* at 14.

89. *Id.*

90. *Id.* at 14–15.

91. *Id.* at 14.



The jurors questioned in this study seemed to have some concerns about how the court handled their privacy rights, but not to the level of outrage about their treatment.<sup>92</sup> Thus, privacy concerns about prospective jurors are an issue to be considered in the conduct of voir dire, balanced against the needs of the court to assess bias.

#### IV. WHY IS LIMITED VOIR DIRE SO INEFFECTIVE?

There are a number of reasons why limited voir dire is an inadequate method of detecting juror bias. Some jurors, probably the minority, lie purposefully. More often, jurors fail to disclose pertinent information because of privacy concerns or other factors. Still others may not recognize their own biases. Features of limited voir dire exacerbate these problems.

Sometimes prospective jurors do not plan to deceive the judge and attorneys; instead, their false disclosure is due to their overestimation or underestimation of their attitudes and biases.<sup>93</sup> Often people are unaware of how much influence certain experiences can have over the decisions they will make in the future. Others are so concerned with the pressure to be an impartial juror that they do not think that they are well-suited enough for the task, whether or not they had any experiences related to the case that would compromise their impartiality.<sup>94</sup>

Even when prospective jurors are able to recognize their biases and disclose them, the judge may still elicit a false response that is more in line with the desirable answer. If a judge asks if the prospective juror could be impartial and the prospective juror replies no, the judge may continue that it is the juror's duty to follow the law and ask the question again. Prospective jurors may give in to the pressure to comply and say they can be impartial, even though their real feelings have not changed. The judge's approval is important to a lot of prospective jurors and many will alter their responses or hide certain attitudes in order to be perceived favorably. Many prospective jurors who have a desire to serve on the jury want to appear desirable to the attorneys and the judge so that they are not excused.<sup>95</sup>

92. *Id.* at 17.

93. Shari Seidman Diamond et al., *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J.L. & PUB. POL'Y 77, 92, 93 (1997).

94. *Id.*

95. *Id.* at 91-92.

The desire to appear favorably is a main concern of prospective jurors, and that shapes the attitudes and opinions that they disclose during the voir dire.<sup>96</sup> Therefore, prospective jurors are hesitant to share embarrassing experiences and beliefs because of the broad audience that can learn of their responses. The lawyer, the judge, and other prospective jurors would hear their responses, in addition to the rest of the public and the court reporter who records their words into official documentation that can be seen by others in the future. This large potential audience may create fear in those prospective jurors who are shy about public speaking. As we saw in Judge Mize's study, they may fail to volunteer their prejudices or will provide only limited responses to questions.<sup>97</sup>

Another issue is that a small number of questions may not cover critically important areas of potential bias. With only modest information about prospective jurors, judges and attorneys may be completely unaware of prospective jurors' relevant experiences and background and may be oblivious to the importance of exploring such experiences during voir dire. For example, in an interview study one of us (Hans) conducted, it was not uncommon to discover that prospective jurors had relevant experiences (for example, a prospective juror's permanent limp caused by a childhood knee injury, in a case in which the plaintiff claimed knee problems) that had not arisen during voir dire questioning.<sup>98</sup> Lack of information prevents judges and attorneys from reviewing and assessing pertinent data.

The form of the question is critical. Is it a leading question where the "correct" or legally and socially appropriate answer is obvious? Lawyers, of course, are well aware of the dynamics of asking leading questions, posed not to obtain information but to produce a desired effect. Social psychologists have documented a phenomenon they label the "social desirability effect."<sup>99</sup> People are motivated to present themselves in a positive, socially desirable light. The leading questions typical of limited voir dire often suggest the right, socially desirable answers. For similar reasons, open-ended

96. *Id.* at 90.

97. *Id.*; see also Mize, *supra* note 33.

98. The interviews are described in HANS, *supra* note 12.

99. Hazel Markus & R. B. Zajonc, *The Cognitive Perspective in Social Psychology*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 137, 184 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985).

questions are often superior to close-ended questions for obtaining accurate information.<sup>100</sup>

A major drawback of group voir dire is that it requires prospective jurors to identify their own potential biases and come forward. However, jury duty is often stressful for jurors and they may be too shy or nervous to come forward even if they have a pertinent experience to discuss. A criminal trial might involve drugs, sexual behavior, violent victimization, or other issues that are difficult for prospective jurors to discuss, especially if they have had similar experiences. Civil litigation can involve accidents, personal injury, or medical operations. Prospective jurors with similar experiences may be too embarrassed to volunteer their experiences. Even if prospective jurors are willing to reveal all, they may be unaware of their own biases. Psychological research documents that many people are not conscious of some of the significant factors that shape their behavior.<sup>101</sup>

Alternatives to group questioning include individual questioning and the use of juror questionnaires. Questioning prospective jurors individually allows the judge or attorneys to probe for relevant knowledge and experiences and to ask each juror specific questions about them. Use of questionnaires has another advantage. Instead of the immediate response required of any type of personal questioning, questionnaires are filled out in private and allow jurors to reflect honestly on the areas being examined and to search their memories for relevant experiences and beliefs. Although it is still possible for jurors to lie or withhold information, it is not as easy or as likely as it is with group questioning.

Who does the questioning may also play a role. Some studies suggest that judges are not as effective as attorneys in uncovering potential biases.<sup>102</sup> Some of the advantage may accrue from the fact that the attorneys know much more about their case than the judge does and therefore are better able to pose good questions during voir dire. If judges and attorneys tend to ask different types of questions (with judges preferring close-ended questions and attorneys open-

100. Kathi Middendorf & James Luginbuhl, *The Value of a Nondirective Voir Dire Style in Jury Selection*, 22 CRIM. JUST. & BEHAV. 129 (1995).

101. Robert W. Pearson et al., *Personal Recall and the Limits of Retrospective Questions in Surveys*, in QUESTIONS ABOUT QUESTIONS: INQUIRIES IN THE COGNITIVE BASES OF SURVEYS 65 (Judith M. Tanur ed., 1992); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977).

102. Suggs & Sales, *supra* note 40.

ended questions, for example) that could make a difference in their effectiveness as well.

The role differential between judge and attorney on the one hand and the prospective juror on the other may also affect a prospective juror's candor. Suggs and Sales reviewed the research on self-disclosure, or people's willingness to reveal information about themselves.<sup>103</sup> A questioner's status affects whether individuals will disclose information. Self-disclosure follows a curvilinear relationship. When the interviewer (here, the judge or the attorney) has either very high status or very low status, self-disclosure is lower than when the interviewer is of intermediate status. Suggs and Sales suggest that because judges have higher status than attorneys, they are more likely to inhibit prospective jurors' self-disclosure.<sup>104</sup>

Susan Jones conducted an experiment to explore this hypothesis.<sup>105</sup> She gave subjects selected from a voters' list a pretest measuring their attitudes toward a variety of social and legal issues. She measured attitudes toward minorities, courts, socio-legal issues, and deterrence. Then, the study participants experienced mock voir dire. The voir dire varied whether an attorney or a judge questioned the participants about their attitudes. Actors were assigned to play the role of either a judge or an attorney during the voir dire questioning.

Jones compared the participants' responses to the pretest and the voir dire, measuring the similarities and differences between the two.<sup>106</sup> Interestingly, mock jurors changed their expressed attitudes more when questioned by judges, in line with the Suggs and Sales hypothesis.<sup>107</sup>

In conclusion, features of limited voir dire encourage a lack of candor. However, this conclusion also suggests the framework for a remedy. Expanding voir dire in specific ways can encourage prospective jurors' honesty and full reporting, and improve the court's and advocates' ability to detect prejudice in potential jurors.

103. *Id.*

104. *Id.* at 253, 254.

105. Jones, *supra* note 40.

106. *Id.* at 136.

107. *Id.* at 143.

## V. RECOMMENDATIONS

There are a number of ways to improve the voir dire process. Below, we highlight four specific changes that would enhance the ability of counsel and the courts to identify potentially biased jurors during voir dire.

### A. *Increased Use of Juror Questionnaires*

The use of juror questionnaires allows prospective jurors to answer voir dire questions in writing. Supplemental questionnaires have several advantages. Questionnaires are efficient in that they can quickly pinpoint for the court and the attorneys the specific areas that require individual follow-up questioning. The private nature of the questionnaire can be a relatively comfortable way to reveal sensitive material that might arise in criminal and civil cases, such as past crime victimization or medical experiences. It also encourages completeness, as prospective jurors have more time to contemplate their answers than they would if they answered them orally.<sup>108</sup>

In many cases, questionnaires can be filled out while prospective jurors are waiting to be called, further increasing efficiency. If lengthier questionnaires are required in complex trials, they can be completed at home in advance of the trial and mailed to the court. Although there is some risk that others may provide input or even fill out the questionnaire if it is done at home, this approach has been used successfully in trials where a lengthy questionnaire was required.<sup>109</sup> It is apparently more common, though, to have prospective jurors complete their questionnaires at the courthouse.<sup>110</sup>

108. JURY TRIAL INNOVATIONS 60 (G. Thomas Munsterman et al. eds., 1997); see also Diane Wiley, *Pre-Voir Dire, Case-Specific Supplemental Juror Questionnaires*, in A HANDBOOK OF JURY RESEARCH 16-1, 16-3 (Walter F. Abbott & John Batt eds., 1999). Questionnaires are particularly recommended in notorious and high-profile trials, where it can be anticipated that a substantial proportion of potential jurors may be biased. However, they should reduce the overall amount of time spent in voir dire even in ordinary trials. See H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Jury Trial Procedures*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 379, 382 (Robert E. Litan ed., 1993).

109. For example, in the capital federal trial of Timothy McVeigh on charges relating to the Oklahoma City bombing of the federal building, prospective jurors received a four-page preliminary questionnaire in the mail, completed it at home, and mailed it back to the court. Additional questioning was conducted at the courthouse. Chance Conner, *Summons Coming to You?*, DENVER POST ONLINE, Feb. 20, 1997, available at <http://63.147.65.175/bomb-bomb28.htm>.

110. In a number of high-profile trials, prospective jurors completed their questionnaires at the courthouse. In the highly publicized murder trial of Rabbi Fred Neulander on charges that he hired someone to kill his wife, prospective jurors in that trial filled out the 174-item

Most cases might be able to use relatively brief questionnaires consisting of several background items along with case-specific questions. One option is to develop a standard form for particular types of civil jury trials that would be printed on a pressure-sensitive form with multiple copies. The bottom form would go to the prospective jurors, and other copies would go to the judge and the parties' attorneys. The form would include the standard background questions and a supplemental set of questions appropriate for the specific type of trial. For example, in most automobile accident trials, the court and attorneys will want to know about any automobile accidents a prospective juror has had, and any injuries that occurred. Using a questionnaire to obtain this information (rather than relying on en masse questioning) increases the likelihood of getting complete information and does it in an efficient manner. It also identifies the prospective jurors with relevant accident experience who require individual follow-up.

Prospective jurors whose names are called for a particular case could fill out the forms in the jury assembly room, and bring their completed forms with them to the courtroom, where the copies would be distributed prior to jury selection. Those prospective jurors who are not selected for the case would get their copies back. In a one-day/one-trial system, they could then reuse the copies if appropriate for another jury selection. Jurors who serve on the case could also get their copies back unless the judge or parties require the copies for the duration of the trial or any appeals.<sup>111</sup>

### *B. Changes in the Method of Questioning*

Group voir dire, in which prospective jurors are asked en masse to identify potential biases and to come forward, is an inadequate method of assessing juror bias. Some method of obtaining specific information about key issues in the case from each prospective juror,

questionnaire at the courthouse. COURIER POST ONLINE, Aug. 21, 2001, available at <http://www.southjerseynews.com/neulander/m082101a.htm>. Potential jurors in Andrea Yates's nationally publicized murder trial for the deaths of her children also filled out a lengthy questionnaire at the courthouse. Carol Christian, *Yates' Trial Gets Underway: Potential Jurors' Minds Made Up*, HOUSTON CHRON., Jan. 8, 2002, available at <http://www.chron.com/cs/CDA/story.htm/special/drownings/1201284>.

111. Wiley, *supra* note 108, observes that the confidentiality of juror questionnaires has not been definitively established. The Sixth Amendment right to a public trial covers jury selection. In high-profile cases, juror responses, whether oral or written, would probably be made available to the press. *Id.* at 16-5.

such as using juror questionnaires or asking individual questions, is needed. As Judge Mize discovered, even a brief opportunity to speak face-to-face with individual prospective jurors produces relevant information that is not obtained in the group questioning method.

An intermediate approach that is used in some jurisdictions, particularly those with attorney questioning, is to ask a set of questions to small groups of prospective jurors, varying whether questions are targeted to the group as a whole or to individual jurors by name. There could be some positive advantages of this method. For example, prospective jurors who disclose personal views and experiences can serve as a model, encouraging self-disclosure by other prospective jurors. Compared to juror questionnaires or individual questioning, however, a prospective juror's responses are not as private, since they are given in open court, and they could taint the views of other prospective jurors. Another disadvantage is time, since questions need to be repeated for subsequent groups of potential jurors.

### C. *Expand the Types of Questions That Are Asked During Voir Dire*

In limited voir dire, it is typical to ask only a question or two, if that, pertaining to the subject matter of the case. More often, a general question about the potential for bias (e.g., "Is there anything that would prevent you from being a fair and impartial juror in this case?") is all that is asked. For greater effectiveness, the voir dire should include a larger number and broader range of case-specific questions. The items should incorporate some open-ended questions in which prospective jurors are encouraged to describe their views and experiences in their own words. Diane Wiley provides an example with automobile accident injuries that combines yes/no close-ended questions with opportunities for potential jurors to explain the relevant events in their own words:

Have you even been seriously injured or has anyone close to you been seriously injured or killed in an automobile accident. . . ? If yes, please describe the circumstances. Was a complaint, lawsuit, or claim of some sort made about this? If yes, please explain. How was that complaint or claim resolved? How do you feel about that resolution?<sup>112</sup>

In developing a set of questions, we recommend using case-specific questions that are linked to key issues and factors in the

112. *Id.* at 16-30. Wiley provides this series of questions for a written juror questionnaire, but they could be easily adapted for individual questioning.

upcoming trial. A great deal of psychological research indicates that case-specific attitudes are most closely linked to actual decisions.<sup>113</sup> Thus, these types of queries are most likely to be productive in developing information for peremptory and for-cause challenges. Questions specifically linked to issues in the current case should be less likely to arouse questions about relevance among prospective jurors.

#### *D. Include a Period of Attorney Questioning*

A final recommendation for those jurisdictions that now rely exclusively on judicial questioning is to include a period of attorney questioning during voir dire. Whether judges or attorneys should conduct the questioning, and their relative advantages and disadvantages, has been extensively debated. The Federal Judicial Center study indicates that in the federal courts, attorney involvement in voir dire has doubled over the past several decades.<sup>114</sup> Although empirical research is modest, the research that is available points to the superiority of attorney voir dire in uncovering juror bias.

Initially, those jurisdictions that now use judge-only questioning may wish to provide attorneys with an opportunity to engage in supplemental and/or follow-up questioning, as is the modal practice in the federal courts. We also recommend that bar groups offer continuing education seminars to provide education and training in the art and science of effective questioning.

### CONCLUSION

In summary, the typical voir dire as it is currently conducted is often inadequate for detecting the biases of prospective jurors in criminal and civil trials. By expanding the use of questionnaires, modifying the questioning method and content, and allowing direct attorney participation, the courts could create a more effective voir dire.

113. See discussion in Hans, *supra* note 32. A classic citation for the proposition that specific questions about a person's behavioral intentions are better predictors of behavior than more general questions is ICEK AJZEN & MARTIN FISHBEIN, *UNDERSTANDING ATTITUDES AND PREDICTING SOCIAL BEHAVIOR* (1980).

114. Shapard & Johnson, *supra* note 19.



